

**Trial Counsel:** I drafted this guide after watching many new TC's struggle with urinalysis cases. After trying numerous 112a's I noticed that although fact patterns vary from case to case, the prima facie case is the same each time. Urinalysis cases lend themselves to the use of templates, and this guide formalizes in "cookbook" fashion the materials needed to prepare for trial. By following your trial checklist and tailoring the enclosures to the facts you can efficiently prepare for trial and maximize your chance for a conviction.

The material in the guide does not reflect the views or policies of the U. S. Marine Corps, U. S. Navy, or the Department of Defense; it was drafted by trial counsel for trial counsel. The guide is in Word format using Courier New 10 and Times New Roman 12 fonts. Male pronouns are used for simplicity. After printing the documents you should tab them in a 3-ring binder and add your own accumulated material. Nothing in the handbook is copyrighted and there is no classified information.

Case law cites were (almost) eliminated, and there is no section on pretrial motions. However, for assistance in writing motions I recommend you obtain a copy of the excellent "Drug Testing Case Law Update" compiled by the USAF Drug Testing Program, Brooks AFB, TX. See tab M.

To the many counsel who, directly or indirectly, contributed to this guide, I give thanks. Thanks to Mr. Robert Czarny from the NDSL, San Diego for preparing Tab L.

If you have comments or suggestions contact me at DSN 365-4276. Any feedback is welcome, especially if the members give "6, 6 and a kick".

Semper Fidelis.

Major Ockerman

PROSECUTING URINALYSIS CASES:  
A GUIDE FOR TRIAL COUNSEL

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## PRELIMINARIES

If you're unfamiliar with the Naval Drug Screening Laboratory (NDSL), then read the Overview of Forensic Urine Drug Testing Procedures (tab L). Most urinalysis cases involve marijuana, cocaine, LSD, or methamphetamine. Up to 20% of samples are also tested for opiates, but positive tests for those drugs are uncommon. For other drugs there is usually a probable cause search of the urine and therefore more evidence. Samples suspected of containing steroids are tested at the UCLA Olympic Analytical Lab; order the document pack and expert from them (tab J).

The following are tips to assist your trial preparation. Good luck!

Investigation - Interview witnesses as early as possible; beat the defense to them. Interview anyone who knows the accused, including roommates, acquaintances, and coworkers. The accused often makes inculpatory statements, and will frequently lock himself into (or out of) a defense long before speaking to defense counsel ("I went to a party and ate these brownies that tasted funny" or "it was my bodybuilding supplements"). Find out if the accused was taking diuretics to flush his system – this is admissible evidence that may get you a “consciousness of guilt” instruction. See if the accused was on leave before the urinalysis. Find out who notified the accused he tested positive. The accused may have said something inculpatory upon being notified, or even nothing at all. Lack of surprise or nonchalance is admissible demeanor evidence. Give notice of any statements by the accused well in advance of trial. If post-arraignment, copy the notice to the military judge (MRE 304d2B).

Preservice drug use offers fertile ground to impeach the accused's in-court testimony or character opinions - check his SRB and enlistment documents for drug waivers or other disclosures; call the recruiter if necessary. "Hanging out" with known drug users or drug parties can be character-destroying evidence ("does that sound like a good marine/sailor?").

When interviewing witnesses you fear may later change their story, make them write out and sign a statement, or interview them in the presence of another person, your legal clerk or another counsel for example. Interviews can be done over speakerphone - and you don't have to tell the witness there are others in your office listening to the conversation. Failure to do this may result in you relinquishing the case to others – so that you can take the stand to impeach the witness!

Schedule the expert for the 2nd day of trial. Keep him on recall until after the defense rests; you may need him for rebuttal. Consider seating him at your table if the accused testifies so he can address the testimony of the accused. This eliminates the expert's "impartial" appearance, but most members implicitly feel the expert is on your side anyway. If you can get an expert in uniform do it - the subtle message is that he's "one of us," not a hired egghead (no offense intended to any experts).

If you're unfamiliar with the NDSL call and ask for a tour. The technicians will gladly explain the testing methods in as much detail as you can handle and walk you through the procedures. This knowledge is invaluable - especially during redirect of the expert.

I recommend reinterviewing the expert by phone as close to trial as possible, preferably the day before. The defense will undoubtedly call the expert and you can find out what questions the defense counsel posed - a great way to learn the defense strategy. Also, the expert can shore up weaknesses in your case and gauge the viability of the defense.

Interview the expert carefully concerning the nanogram level and window of detection for the drug in question. Many innocent ingestion cases can be won by explaining that the low nanogram resulted from the natural passage of the metabolite through the body – in other words a decreasing level over time. Often you can show that at the time he first took the drug his level was likely very high (nail down the date of the party!). If however the nanogram level was low and you can't expand the window of detection, you have an uphill battle; such a defense has a higher probability of success, particularly in light of U.S. v. Campbell (see below).

The defense may ask the expert about some confusing studies or theories allegedly showing the uncertainty or unreliability of drug testing in general. Talk to the expert - is he aware of such studies? Can he intelligently discuss them? Is he familiar with the scientific literature? If he doubts the defense counsel's spin on the articles encourage him to share that with the members - after all, he's the expert, not the defense counsel.

The defense counsel may ask the expert questions about a scenario being "possible". For example: "Mr. Czarny, isn't it *possible* that a person can absorb cocaine through their fingers and test positive". The expert will answer "Yes" because anything is possible. Don't leave it at that; your redirect question is about "probabilities". Example: "It's possible to test positive, but is it *probable*?" This allows the expert to testify about how it's not at all probable and slam the door to that reasonable doubt.

(PTIR) to the military judge and request the next available 39a session to arraign and set trial dates. Rarely are experts (or even lab documents) immediately available. The military judges understand this and will docket accordingly; you will probably have plenty of preparation time.

Motion for Not Guilty Finding (R.C.M. 917) – You must be familiar with the case of U.S. v. Campbell 50 MJ 154 (1999), and CAAF's reconsideration of the case at 52 MJ 386 (2000). Expect the defense to make a verbal or written motion for a finding of not guilty based on this case. This won't occur until after you rest in your case in chief; the defense is not required to give you notice. I recommend preparing a written memorandum of law prior to trial discussing the law and why the defense motion should fail. After the defense makes the motion, present your memorandum to the judge and cross your fingers.

Success in Campbell motions depends on the judge, the nanogram level (low is bad), and how the expert testifies. Jurisdictions report mixed results; it will take a while for the dust to clear on this issue.

## WHAT YOU NEED TO PROSECUTE A URINALYSIS CASE

### WITNESSES

COORDINATOR

OBSERVER

CSACC INTAKE AND CSACC DRIVER (optional - tightens the chain of custody)

(Note: Your base may not deliver samples via a CSACC - if not, skip this step)

EXPERT (required to explain any test result Berry 30 MJ 134, Kelly 39 MJ 235))

MISCELLANEOUS WITNESSES AND EVIDENCE AGAINST ACCUSED:

- Inculpatory statements and evidence (give notice IAW MRE's 304 and 311)
    - Use or possession of diuretics by accused or attempts to chemically beat the urinalysis. Curtis 45 MJ 480
    - Demeanor of accused when informed of positive urinalysis
- Note: give notice IAW MRE 304d as "nonverbal statement"
- Rebuttal of innocent ingestion
  - Bad or untruthful character opinion/reputation

### EVIDENCE

LARGE DIAGRAM OF HEAD (2'x3') (PE 1)

COMMAND LOG SHEET (PE 2)

DRUG LAB DOCUMENT PACKAGE (PE 3)

BOTTLE (PE 4)

LARGE DIAGRAM OF NAVDRUGLAB FLOOR PLAN (PE 5)

### DEMONSTRATIVE AIDS

CHAIN OF CUSTODY DIAGRAM (for argument)

POINTER (LASER OR WOODEN)

EASEL

### FOR THE RECORD OF TRIAL

POLAROIDS OF BOTTLE, HEAD DIAGRAM & DRUGLAB DIAGRAM

## TRIAL SEQUENCE - U.S. v. \_\_\_\_\_

### Assemble Members

### Voir Dire

### Opening

### Case in Chief

#### Government Evidence

- Coordinator
  - Head diagram PE 1
  - Command log sheet PE 2
  - Lab docs PE 3
  - Bottle PE 4
- Observer
- CSACC Intake
- CSACC Driver
- Expert
  - Druglab diagram PE 5

\*Ask that the expert sit at your table to listen to the testimony of the accused about innocent ingestion, so that he can form an opinion (RCM 703)

\*REST - admit any documents not yet admitted\*

\*Defense motion for a finding of not guilty (RCM 917)\*

#### Defense Evidence

#### Government Rebuttal Evidence

### Argument

### Instructions

### Presentencing

#### Government Evidence

- Right side SRB (USMC)
- Left side ESR (Navy)

Defense Evidence (\*Note: object to defense evidence so judge relaxes MRE's if you need to get rebuttal presentencing evidence in - object on hearsay AND

UNITED STATES MARINE CORPS  
NAVY-MARINE CORPS TRIAL JUDICIARY  
SIERRA JUDICIAL CIRCUIT

UNITED STATES	)	
	)	SPECIAL COURT-MARTIAL
V.	)	
	)	DISCOVERY RESPONSE
John A. Druguser	)	AND REQUEST
Private	)	
U.S. Marine Corps	)	
123 45 6789	)	

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To: Captain U. R. Defense, USMC, Defense Counsel:

1. Pursuant to R.C.M. 701(a)(1) and (2), all required information or matters within the possession, custody, or control of military authorities was provided to the defense counsel or is available for defense inspection. Pursuant to R.C.M. 701(d), the prosecution will further make available for inspection any additional evidence previously requested or required to be produced that is discovered before or during this court-martial. Attached to this request are the following:

- a.
- b.
- c.

2. Disclosure by the Defense. Pursuant to R.C.M. 701(b), the defense shall provide the following information to the trial counsel:

- a) Notice of intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility or intent to introduce expert testimony as to the mental condition of the accused, as set forth in R.C.M. 701(b)(2);
- b) Reports of examination and tests as set forth in R.C.M. 701(b)(4);
- c) The names and addresses of all witnesses whom the defense intends to call during the defense case in chief and all sworn or signed statements known by the defense to be made by such witnesses in connection with the case, as set forth in R.C.M. 701(b)(1)(A); and
- d) The names and addresses of all witnesses whom the defense intends to call at the



3. The defense is requested to permit the prosecution to inspect books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial as set forth in R.C.M. 701(b)(3), or any written material that will be presented by the defense at the presentencing proceedings, as set forth in R.C.M. 701(b)(1)(B)(ii). As set forth in R.C.M. 701(h), "inspect" includes the right to photograph and copy.

4. As noted in R.C.M. 701(d), this request continues before and during trial.

I. M. PROSECUTOR  
Captain, USMC  
Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the detailed defense counsel this **xxth** day of \_\_\_\_\_, 200\_

I. M. PROSECUTOR  
Captain, USMC  
Trial Counsel

**UNITED STATES MARINE CORPS**  
LEGAL SERVICE SUPPORT TEAM D  
LEGAL SERVICE SUPPORT SECTION  
1ST FORCE SERVICE SUPPORT GROUP, MARFORPAC  
CAMP PENDLETON, CALIFORNIA 92055-5607

5811  
LSST-E/sbo  
[date]

From: Trial Counsel  
To: Legal Department, Navy Drug Screening Laboratory, 34425 Farenholt Avenue,  
Suite 40, San Diego, CA 92134-5298

Subj: DISCOVERY REQUEST, CASE OF U.S. V. PRIVATE J. A. DRUGUSER  
XXX XX XXXX USMC

Ref: (a) NAVDRUGLAB MSG R 182046Z AUG 00  
(b) RCM 701(a)(2)(B), M.C.M. 1995  
(c) U.S. v. Sebring, 44 M.J. 805 (N.M.Ct.Crim.App. 1996)

Encl: (1) DC Discovery Request of [date]

1. Reference (a) is the message identifying the accused's positive urinalysis specimen. Enclosure (1) is the defense counsel request for discovery materials pursuant to the Government charging the accused with a violation of Article 112a, UCMJ.

3. Request you provide documentation of any inspections, examinations, validations, or other verification of the drug laboratory quality control program, as well as any records showing problems involving laboratory equipment and employee errors, negligence and misconduct. Specifically, request you provide the information contained in paragraph (1)(w) of the enclosure. Such information is considered to fall within the category of "scientific tests or experiments" covered by references (b) and (c).

4. Thank you for your assistance.

UNITED STATES MARINE CORPS  
NAVY-MARINE CORPS TRIAL JUDICIARY  
SIERRA JUDICIAL CIRCUIT

UNITED STATES	)	
	)	SPECIAL COURT-MARTIAL
V.	)	PRETRIAL DISCLOSURE
	)	MRE 304
John A. Druguser	)	
Private	)	
U.S. Marine Corps	)	Date:
123 45 6789	)	

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To: Captain U.R. Defense, Defense Counsel:

Disclosure is given of the following relevant statements made by the accused that are known to the trial counsel :

- a. Oral statement on or about \_\_\_\_\_ to \_\_\_\_\_, that "[statement by accused]."
- b.
- c.

I. M. PROSECUTOR

UNITED STATES MARINE CORPS  
NAVY-MARINE CORPS TRIAL JUDICIARY  
SIERRA JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
V.	)	PRETRIAL DISCLOSURE
	)	MRE 311
John A. Druguser	)	
Private	)	
U.S. Marine Corps	)	Date:
123 45 6789	)	

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To: Captain U. R. Defense, Defense Counsel:

Disclosure is given of the following evidence seized from the person or property of the accused, or believed to be owned by the accused, that the government intends to offer into evidence against the accused at trial:

- a. Written statements of accused to NCIS dated\_\_\_\_\_ and \_\_\_\_\_.
- b. Marijuana smoking device (bong) seized from the person of the accused on \_\_\_\_\_.

I. M. PROSECUTOR

UNITED STATES MARINE CORPS  
NAVY-MARINE CORPS TRIAL JUDICIARY  
SIERRA JUDICIAL CIRCUIT

UNITED STATES

)

)

V.

)

)

PRETRIAL NOTICE

John A. Druguser

)

RCM 701

Private

)

U.S. Marine Corps

)

123 45 6789

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To: Captain U. R. Defense, Defense Counsel:

1. The Government intends to call the following witnesses during the prosecution-in-chief:

- a. Debra Good [phone number]
- b. Carrie Honest [phone number]

2. The government intends to introduce the following evidence currently in government custody during the case-in-chief:

- a. Laboratory Documents

3. The government intends to call the following witnesses during presentencing:

- a. Debra Good

4. The government intends to introduce the following evidence currently in government custody during presentencing:

- a. Right side of accused's SRB

5. The government requests that in accordance with RCM 701 and RCM 1001, the defense provide the names and addresses of any witnesses whom the defense intends to call during the defense case-in-chief and at the presentencing proceedings, and permit the trial counsel to inspect any sworn or signed statements known by the defense to have

## VOIR DIRE AND OPENING

VOIR DIRE - In urinalysis cases members are often very junior. Conventional wisdom favors older, more experienced members. Older members have taken many urinalyses and presumably failed none, and undoubtedly know of allegedly "good" Marines or Sailors caught using drugs. Young members are recently removed from the college scene, and may be (at least unconsciously) more lenient at sentencing; O-1's are prime candidates for challenge. Examine member reactions to your questions carefully and individually voir dire those who hesitate in the slightest concerning the urinalysis program. Some may feel it is unfair or unreliable; everyone is a little nervous when they turn a sample in. During one voir dire we discovered a Major who paid for a private test after every urinalysis. Obviously, he didn't survive challenge. Ferret out such attitudes aggressively.

OPENING - Many cases are won or lost in voir dire and opening, since the defense is already working to sow doubt. However, there is no need for a long opening in urinalysis cases, and a long opening may actually hurt you. You must exude confidence without overstating the case. Get out your main points, tell them what they will hear, and sit down. Here is a sample outline:

1. One sentence synopsis of case ("This is a case about...").
2. Basic facts - unit, urinalysis date, how conducted, results, inculpatory statements, etc.
3. Urinalysis program - why we have one:
  - Can't observe Marines 24 hours a day and on liberty.
  - Work performance is not the whole picture.
  - Only practical method of catching users.
4. Inferences: Drug use is a crime done in secret (no eyewitnesses).
  - The law recognizes this and allows certain inferences (knowledge and wrongfulness).
  - How an inference is established (see instructions).
  - Once the inference is established, the Government has proved it's case.
5. The Government will provide evidence to show:
  - Urine was properly collected, stored and transported to the lab.
  - The sample was properly tested 3 times.
  - All the tests showed evidence of drugs in accused's urine.
6. The Government will show you the above by presenting the following:
  - Coordinator (synopsis of how urine collected).

**NOTE:** These are specific for 112a cases; they don't include basic voir dire about burdens of proof, presumptions, etc, which you should supply yourself.

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[SPECIAL][GENERAL] COURT-MARTIAL  
NAVY-MARINE CORPS TRIAL JUDICIARY  
SIERRA JUDICIAL CIRCUIT  
)  
UNITED STATES )  
v. ) GOVERNMENT WITNESS LIST  
Nelson Muntz ) AND PROPOSED VOIR DIRE  
Lance Corporal )  
123 45 6789 )  
U.S. Marine Corps )

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Experience with Urinalysis Programs

. Does anyone have training in the area of urinalysis? Has anyone been a SACO, urinalysis coordinator, or urinalysis observer?

. Have any of you ever heard of the Consolidated Substance Abuse Control Center (CSACC) here at Camp Pendleton? How about the Naval Drug Screening Laboratory at Balboa Naval Hospital, San Diego?

. Does anyone have special training or knowledge in the area of [list drugs], or other illegal drugs?

. Does anyone feel it's unfair to test urine to find out who is using drugs?

. Do any of you have a negative opinion about urinalysis testing in general?

Inference of knowledge

. Is any member familiar with the legal concept of an "Inference?"  
[if affirmative response]  
- Colonel Smith, where did you learn that concept, was it a court martial?  
- As you remember it, what was the legal definition of an inference?

. Members, at the end of this trial the judge will instruct you as follows: "An inference is a process of reasoning by which a fact is found to be a logical consequence of other facts." I know this sounds confusing so here's an example: if you wake up in the morning and everything outside is soaking wet you may *infer* that it rained the night before, even though you didn't see it rain. Does everyone

drugs?. Does anyone believe a Marine cannot be convicted of drug use based solely on a positive urinalysis? Does anyone feel that would be unfair?

#### Stereotypes

. Let's talk about stereotypes. Many people have mental images of drug users; for example, the "dope-smoking hippie." Some people don't imagine a drug user with a short haircut, or a freshly pressed uniform. If evidence supported a conviction, could you convict a Marine of drug use even if he didn't fit your stereotype of a drug user?

#### Some Marines use drugs despite the consequences

. Would each member agree that a Marine may have a lot to lose if caught using drugs? He might suffer serious consequences, correct?

. Despite this, have each of you heard of, or known Marine's who used drugs?

. Marines may have a lot to lose by using drugs. Does any member feel that fact alone proves a particular Marine never used drugs?

. Everyone agrees that some Marine's use drugs despite the consequences?

#### Urine collection

. During a urinalysis, dozens of Marines may give a sample. You may hear testimony from those running the urinalysis that they collected each sample the same way each time. But, they might not remember each individual sample collected. Will any member require the Government to provide a witness who remembers every sample or even the accused's particular sample?

. You may hear evidence that certain regulations or procedures govern the collection and testing of urine. Is anyone familiar with those regulations or procedures?

. The judge may instruct you that deviations from urinalysis regulations may be considered in determining the reliability of the evidence collected. Does anyone feel that ANY error in collection, no matter how small, ALWAYS means a urinalysis is invalid?

. Let me give you an example. Marines must be under constant observation when giving urine samples. If an observer sneezes and momentarily looks away from the Marine, this might be a technical deviation in procedure. Based on that fact alone, would anyone feel in every case that sample was invalid?



on them. Does anyone feel that this fact alone makes all test results invalid?

. At the lab, written records are kept on each sample as testing occurs, recording the procedures used to test that sample. Does any member feel that written records are any less reliable than an eyewitness to establish that testing was done correctly?

. Members, you may hear testimony of an expert giving opinions on various subjects. Does anyone feel they cannot accept an expert's opinion unless they themselves fully understand every single thing the expert testifies about?

. In other words, if an expert testifies about molecular testing of urine samples, would you have to be a chemist or molecular expert yourself before you'd consider his testimony?

URINALYSIS COORDINATOR DIRECT EXAMINATION

- Swear
- State your full name, spelling your last
- How long have you been in the Marine Corps?
- Where are you currently assigned?
- Where is that unit located?
- How long have you been assigned to that unit?
- What is your billet? [Urinalysis coordinator]
- What are your duties and responsibilities in that billet?
- How long have you had that billet?
- What training and education did you receive to become the urinalysis coordinator?
- During those courses did you learn how to set-up and perform a urinalysis program?
- What orders and publications guide you in the performance of your duties as a urinalysis coordinator? [MCO P5300.12 - USMC Substance abuse program]
- Approximately how many urinalysis sweeps have you conducted?
  
- I direct your attention to [date] of this year. Did you conduct a urinalysis on that day?
- Was that what is known as a unit sweep urinalysis?
- Who ordered that urinalysis?
- What was the premise of that urinalysis?
- When did you receive that order?
- Approximately how many Marines took that urinalysis?
- How long did the urinalysis last from start to finish?
- Tell the court what you did to prepare for that urinalysis.
  - Gathered bottles from our storage space
  - Prepared labels
  - Got list of Marines
  - Got red tape, boxes, log sheets
  - Assigned observer
  - Took stuff to head, set up table
- When did you do all this?

(Hang head diagram) PE 1

- I am showing you what's been marked as PE 1 for identification.
  - What is that? How do you recognize it? (I drew it)
- Is that a fair and accurate diagram of the head where you conducted the urinalysis on [date]?

- YH, THE GOVT OFFERS PE 1 FOR ID INTO EVIDENCE AND ASKS THAT THE WORDS "FOR IDENTIFICATION" BE STRICKEN.

- I match card to his face, check roster
- Hand him over to the observer
- Using ID card I fill out 3 forms
  - Label; all except the initials
  - Log sheet
  - Custody document - DD Form 2624
- Marine returns
- I ask him if he's on any medication - annotate the log sheet
- I ask him "Is this your bottle?"
- He sets bottle down.
- I put on label and red tape.
- Direct marine's attention to bottle & log sheet - we verify accuracy of all the information
- If correct, he initials label and red tape
- I ask - "do initials match?" and I check it.
- I place bottle in box in same slot as ID card.
- I Remove ID card
- We verify the info on the log sheet - he reads and signs it
- I dismiss him
- Call next Marine

- How many bottles fit into the box?
- What do you do with the 12-pack boxes as they fill up?
- Where do you store those boxes during the urinalysis? Do they leave your presence at any time?
- What do you do with the samples if you have to make a head call?
- Did you make a head call or take any breaks during that urinalysis?
- Were the bottles in your presence during the entire urinalysis?
- Did anyone tamper with any of the bottles or switch them around?
- What did you do with the samples after completion of the urinalysis?
- Describe the security procedures you use to safeguard the samples upon completion of the urinalysis.
- Were these the procedures you used on [date]?
- Was there anything different about these procedures from the way you always do urinalyses?

(Hand him the urinalysis command log sheet) PE 2

- I'm showing you PE 2 for identification.
- What is that document? [Urinalysis command log sheet for 12 Marines who took the test that day]
- What is the purpose or use for this document?
- How do you recognize it?
  - [My Signature]
  - [Filled out in my handwriting except observer & individual signatures]
- What is a batch number? Who assigns it?

- Are you required by regulation to complete this log sheet?
- Where are these log sheets kept?
- Who is the custodian of the log sheets?
  
- Does PE 2 for identification identify whether or not the accused provided a sample during the urinalysis of [date]?
- What sample number was he in that batch?
- And who does that document indicate was the observer of that sample?

**YH, THE GOVT OFFERS PE 2 FOR ID INTO EVIDENCE**

(Hand him the lab doc package) **PE 3**

- I am handing you what's been marked as PE 3 for identification. I direct your attention to the front and back of the 3rd page.
- What is that document? (DD 2624 specimen custody doc for batch 4873).
- How do you recognize it?
  - [Part of it filled out by me]
  - [my signature on back reflecting change of custody]
- What is that form used for?
- Was PE\_3 for identification prepared by you on \_\_\_\_\_ as you previously described at the time of and during the actual course of the urinalysis?
- Tell the court which blocks you filled out.
- Was this document prepared in the regular course of your duties as a urinalysis unit coordinator?
- Are you required by regulation to prepare this form?
- What happened to the form after you completed the sections of the front of that you completed.
  - [Stays with urine samples at all times]
  - [Copy is filed]
- I direct your attention to the back of that form. What do the signatures in blocks 1a and 1b indicate?
- To whom did you transfer custody of the samples?
- What is CSACC?
- Where are they located?
- Explain how you physically transferred custody of the samples.
- What about the date in block 1a and 2a. Do they indicate when you actually transferred custody of the samples to CSACC?

(RETRIEVE THE DRUGLAB DOC PACKAGE)

(HAND HIM THE BOTTLE) **PE 4**

- I am handing you what's been marked as PE 4 for identification.
  - What is that?

- What is the purpose of the initials on the red tape?

(Retrieve exhibit)

- Nothing further, sir.

REDIRECT - IF CHALLENGED BY DC:

- As part of your SACO duties are you ever inspected?
- By whom?
- When was the last time you were inspected?
- Were there any discrepancies found?
- Since you began your SACO duties, approximately how many urinalyses have you conducted?
- During that time, how many Marines tested positive for drugs?
- How many of those tests were found to be invalid because of faulty urine collection procedures?

OBSERVER DIRECT EXAMINATION

- Swear
- Please state your name and spell it
- Where are you currently assigned?
- How long have you been assigned there?
- How long have you been in the Marine Corps?
  
- I direct your attention to \_\_\_\_\_ of this year . Were you detailed as a urinalysis observer for a unit sweep of [unit]?
- Where did that urinalysis occur?
- Were you briefed on how to perform your duties? How and by whom?
- Have you ever served as a urinalysis observer in the past? How many occasions?

(SHOW HIM THE HEAD DIAGRAM)

- I direct your attention to the PE-1. Is that a correct and accurate diagram of the head area where you were observing the urinalysis?
- Exactly how did you perform your duties and responsibilities as an observer for that urinalysis?
  
- Could you observe the coordinator's table from your position?
  
- Did you actually observe the urine leave the flesh of each Marine tested? Could you actually hear each bottle being filled? Did you take your eyes off of the Marines who were taking the test?
  
- Did you perform your duties the same way for each Marine observed?
  - During the entire urinalysis?
  
- Did anything unusual happen during the urinalysis? Did that affect your duties in any way?

CONSOLIDATED SUBSTANCE ABUSE CONTROL CENTER (CSACC)  
LAB TECH AND SAMPLE INTAKE - DIRECT EXAMINATION

- Swear
- State your full name, spelling your last.
- How long have you been in the Marine Corps?
- Where are you currently assigned? [CSACC]
- How long have you been assigned there?
- What does CSACC do?
- Where aboard Camp Pendleton is the CSACC located?
- What are your duties and responsibilities at CSACC?
- I'm showing you what's been marked as PE 3 for identification, and I direct your attention to the back of the 3rd page.
- What is that document? How do you recognize it?
- I direct your attention to the first "Received by" block, block 1c.  
Do you recognize the signature and name? Who is that?
- What does it mean when you sign that block?
  
- Describe the procedures by which units submit urine samples to CSACC.
  - Check access roster to see if they can drop off samples
  - take batch, custody doc,
  - check ssn/batch #/initials of each bottle with custody doc
  - if any discrepancy, sample discarded and voided off doc
  - I sign doc and accept custody, unit SACO leaves
- Describe what happens to the samples once they are accepted by CSACC.
  - Sealed up, tape signed, placed in storage
- What safeguards are in place to ensure secure storage of the samples?
- I direct your attention to block 2c - what does the signature and name there signify?
- Who is that person? What is her duty?
- How about the signature on the next block? (Driver took custody)
- What does the driver do with the samples (drives them to druglab)
- On what days does she normally make runs to the druglab?
- Does that indicate when she left to deliver the samples?

CSACC DRIVER DIRECT EXAMINATION

- Swear
- State your full name, spelling your last.
- How long have you been in the Marine Corps?
- Where are you currently assigned?
- How long have you been assigned there?
- What are your duties and responsibilities?
- I'm showing you what's been marked as PE 3 for identification, and I direct your attention to the back of the 3rd page.
- What is that document?
- How do you recognize it?
- I direct your attention to the second "Received by" block. block 2c

#### NAVAL DRUG SCREENING LAB EXPERT DIRECT EXAMINATION

- Swear
- Please state your full name and spell your last
- Where do you work?
- How long have you worked at the NDSL?
- What is your job title?

#### EXPERT'S QUALIFICATIONS

- Please give the members a summary of your educational background and the degrees that you hold.
- Are you a member of any professional organizations?
- Do you engage in any sort of continuing education?
- What professional journals do you read to keep current on the field of forensic urinalysis?
- Please summarize for the members your professional experience.
- What are your duties and responsibilities at the NDSL?
- How many personnel do you oversee at the lab?
- Do you have close contact and observe the performance of each of those personnel?
- Would you define for the members the term "forensic urinalysis?"
- As part of your duties do you testify as an expert in forensic urinalysis?
- How many times have you testified as an expert in forensic urinalysis in courts martial?

#### LAB BACKGROUND

- Where is the NDSL located?
- What does the laboratory do?
- Who sends the lab urine for testing?
- What types of substances does the lab test urine for?
- When did the lab begin operation?
- Is the laboratory certified to be a military drug -testing facility?
  - By whom? (DOD)
- What branch of the Navy does the NDSL fall under?
- Does the NDSL have a Standard Operating Procedure in place? Is that a written SOP?
- What agencies oversee the lab's operations?
- How often is the NDSL inspected? By whom?
- During the past year, what were the results of those inspections?
- What days of the year does the lab operate?
- Approximately how many personnel are employed at the lab?
- What types of jobs are there at the lab?
- What background checks are done on personnel before they're hired?
- Do all the personnel actually test urine samples?



LAB DIAGRAM (PE 5)

(HANG DIAGRAM ON THE EASEL, HAND HIM THE POINTER)

- I am showing what is marked as PE 5 for identification.
- Do you recognize that? What is it?
- Does that chart represent an accurate floor plan of the NDSL?
- Would the use of that chart assist you in describing for the members the physical layout of the Navy Drug Screening Laboratory and the various testing and security measures at the lab?
- YH, I ask that PE 5 for identification be admitted into evidence.
- Does the diagram we are viewing represent one building or more?
- And is that a secure building?
- Who has access to the inside of that building?
- How do personnel get access inside that building?
- Is the building split up into smaller rooms or work areas?
- Do each of those squares represent a secure room or work area?
- How do people gain access to each room? Is there a security card of any type required?

ACCESSIONING AREA

- Using the chart, please describe for the court how a batch of urine samples first enters the lab and what happens to them.
- How do unit delivery persons get access to the accessioning window?
- Is the window closed or secured?
- How are boxed samples passed into the secured accessioning area?
- Do the delivering personnel enter the secured accessioning area?
- How do they alert the personnel inside that a delivery is waiting?
- Approximately how big is that accessioning area?
- How many personnel work inside the secured accessioning area?
- How do they gain access to that area?
- Are you familiar with personnel working in the secured accessioning area?
- After a unit deliverer rings the bell, what happens next?
- Are the boxes of urine samples immediately opened and tested?
- Where are the boxes kept while they are waiting to be opened?
- And is that annotated on the custody documents? How? [temp storage]
- How do accessioning personnel check incoming samples and paperwork?
- Do they check each bottle? For what are they checking?
- Do they open the bottles? Do they break the tamper proof tape?
- What do they do with bottles that do not pass inspection?
- Is that annotated on the custody doc?
- Are those samples tested?
- What types of discrepancies will make a bottle fail this inspection?
- What happens after all the bottles and paperwork are checked?
- How are the delivered samples readied for testing? [LAN, STICKERS]

- Were those documents prepared at or near the time of the facts recorded therein?
- Are those type or similar documents prepared for all urine samples received at the drug lab?
- Are those documents prepared in the regular of course of business of the NDSL?
- Are those documents prepared and kept pursuant to and in accordance with relevant orders and regulations?
- Are you the record custodian for those documents?
  
- YH, THE GOVT OFFERS PE 3 FOR IDENTIFICATION INTO EVIDENCE AND ASK THAT THE WORDS FOR IDENTIFICATION BE STRICKEN.
  
- YH, THE GOVT REQUESTS TO PUBLISH PE 3 TO THE MEMBERS. {BAILIFF}
  
- Let me direct your attention to the back of the third page in that package, the specimen custody document. Looking at blocks 2, 3 and 4, would you tell the members what that information means?
- Now down in the lower right hand corner, block 13, what does that information mean?
- Going to the front that form, what is the information contained in Block "F"? (Accession number)
- How is the accession number assigned?
- What is the purpose of the Lab accession number?
- What is the significance of block "G" of that form? (test results)
- Directing your attention to the bottom of that form, what is the significance of the block "H"?
- Do you recognize the signature there? Who is that? What is his job?

#### BOTTLE

- I am handing you PE 4 for identification. What is that?
- I direct your attention to the label on the bottle that appears to have a number typed on it. What is that number? (Accession number)
- Do the social security numbers written on the bottle and on the specimen custody document match up?
- Are the tests that were done on the urine in that bottle described in the laboratory documents, PE 3?

- YH, THE GOVT OFFERS PE 4 FOR IDENTIFICATION INTO EVIDENCE AND ASK THAT THE WORDS FOR IDENTIFICATION BE STRICKEN.

- YH, THE GOVT REQUESTS TO PUBLISH THE EXHIBIT TO THE MEMBERS.

#### TESTING

- What if any forensic laboratory tests were conducted on the urine

#### Screening Test (RIA)

- Please turn to pages 3 through 8. What do those pages record?
- Using the lab chart and PE 3, tell the members how and where that screening test is conducted.
- What kind of a machine conducts that test? (Radioimmunoassay - RIA)
- What is that machine designed to test for? How does it work?

NOTE: Ask him to define terms as he uses them.  
(Ex: Metabolite, aliquot).

- Looking at p.3, what drugs tested positive on the screen?
- And what does page 3 tell us? How about pages 4 and 5?
- How about pages 6, 7 and 8? Are those nanogram levels? What do those numbers mean?
- Is the accused's sample on there? What do those numbers tell you about his sample?
- I notice some of those samples have "BQC" next to them. What are those samples?

#### Rescreen Test (RIA)

- Please turn to pages 17 through 21. What do those pages record?
- What is the purpose of the rescreen test?
- If a sample tests negative on the screen, is a rescreen done? (no)
- What is done with that sample?
- Using the lab chart and PE 3, tell the members how and where a screening test is conducted.
- Looking at p. 17, what drug tested positive on the rescreen?
- What does p. 18 tell us? I notice each sample has the entry "Washtube" before it. What is a washtube?
- Looking at pages 19-21, is the accused's sample recorded there? What does that tell you about his sample?

#### Confirmation Test (GC/MS)

- Please turn to pages 9 through 16. What do those pages record?
- What is the purpose of the confirmation test?
- If a sample tests below the cutoff level on either the screen or rescreen, is confirmation test done? (no)
- What is done with that sample?
- Using the lab chart and PE 3, tell the members how and where a confirmation test is conducted.
- What kind of a machine does that test? How does it work?
- Is that machine regularly serviced and calibrated?
- Does that type of machine have a reputation in the forensic community? What is that reputation? (most rigorous test).
- What other agencies or organizations regularly use GC/MS technology to test for drugs in the United States? (U.S. Customs Committee, FBI)

- What about "publication", and why is publication important in the scientific community?
- Have the scientific theories and techniques of chemical analysis using the RIA and GC/MS machines been subject to peer review or publication?
- Have there ever been studies or reports concerning the accuracy and error rates of the RIA and GC/MS machines?
- Are there known or potential rates of error for those machines? What are they?
- Based upon your reading, study, and observation, what can you say concerning the accuracy, reliability and error rates of the GC/MS machine in detecting and quantifying controlled substances?

[NOTE: Do not ask the expert whether the tests are "scientifically valid," as this is the ultimate question for the judge in deciding whether to admit the evidence under MRE 702. See Daubert 113 S.Ct. 2786 (1993)]

- Returning to PE3, what does page 9 tell us? How about page 10? Page 11? Page 12? Pages 13-16?
- From those pages, at what nanogram level was the accused's sample?
- Have you had an opportunity to review the analytical data contained in PE 3?
- Are there any discrepancies or mistakes in that data?
- What is the purpose of a cutoff level?
- Who establishes the cutoff level? (DOD)
- In establishing cutoff levels, does the DOD take into account the error rate of DOD drug testing machines?
- Does the DOD set them sufficiently high above the GC/MS's margin of error to reasonably preclude the chance of a false positive?
- How was the cutoff level determined by DOD for [this drug]?
- What is the cutoff level for [drug]?
- \*- Is that cutoff level set high enough to eliminate the reasonable possibility of innocent ingestion of [drug]?
- What happens if a sample tests below the cutoff level?
- If a sample tests positive, what is done with the remainder, or unpoured portion of that sample?
- Can it be retested if necessary?

#### DRUG PHYSIOLOGY

- Does the human body produce the metabolite for [drug] naturally?
- How does the metabolite end up in a person's urine?
- Does metabolite level in a person's body change as time goes on?

QUALITY CONTROL

- Please describe for the members what quality control measures are employed to assure accurate testing and reporting. [internal and external]
- Do you receive test specimens for QC purposes of which you are unaware - blind samples? How does this happen? Why is that done?
- Do you receive feedback on your testing of those samples?
- What is a false positive?
- Has NDSL ever reported a false positive of a blind QC sample? (no)
  
- Mr. \_\_\_\_\_, based upon your examination of the testing documents and quality control reports, what is your conclusion as to whether the urine specimen that arrived at the drug lab and was assigned lab accession number \_\_\_\_\_ contained the metabolite for [drug]?
  
- YH, THE GOVERNMENT OFFERS PE 3 FOR IDENTIFICATION INTO EVIDENCE AND ASKS THAT THE WORDS FOR IDENTIFICATION BE DELETED.

## HEADING OFF DEFENSES

### Innocent ingestion (COCAINE)

- How is cocaine normally introduced into the body?
- What metabolite level was present in the urine specimen assigned lab accession number \_\_\_\_\_-?
- Is that a high or low amount of cocaine metabolite for a sample?
- Does metabolite decrease in the body over time after use? Why?
- Is there a general window of time in which we can detect the cocaine metabolite in a person's urine?
- What is that window?
- And that's a function of how much cocaine is ingested into that person's system?
- The more cocaine used, the longer the window of detection?
- Now if the urine specimen assigned lab accession number \_\_\_\_\_ was given on a Wednesday morning, and utilizing the window of detection, is it reasonable to state that a low dose of cocaine taken 48 hours before, or Monday, could have resulted in that level?
- How about a higher dose, taken over the weekend - could it also have resulted in that level?
- So using the general window of detection, the level of metabolite in that sample is consistent with weekend cocaine use?
- Mr. Czarny, I'm handing you what's been marked as PE 6 for identification. What is that document?
- And does it cover a series of accession numbers?
- So that QC report covers the accession number of the accused's specimen?
- What is a blind positive?
- What does that report state about the blind positive QC's submitted?
- What is a blind negative?
- What does that report state about the blind negative QC's submitted?
- If a blind negative screens positive is corrective action taken? What?
- Are the samples then retested/rescreened?
- Now Mr. Czarny, turning to the second page of that report, under discrepancies noted, explain what it says under the label COC?
- What does that mean?
- Now, examining that QC report, were there any discrepancies for the accused's sample accession number?

### PASSIVE INHALATION (THC)

- Has there been research done on the potential for an individual to test positive for THC by passively inhaling marijuana? (yes, most were completed in the 1970's & 1980's)
- Are you familiar with Genovese's study on passive inhalation?

DEFENSE CROSS-EXAMINATION OF LAB EXPERT  
(Methamphetamine case)

NOTE: Defense counsel could sow much doubt if they hit your expert with these questions. Fortunately, a large number of them are objectionable, particularly those dealing with the Norfolk lab. In particular, keep in mind the relevance, speculation, and argumentative objections.

Defense Counsel:

- If we were to announce that everybody in this room had to take a urinalysis test later this afternoon, isn't it a fact that some of the people in this room could have methamphetamine in their system right now and not know it?
- There could be meth in a soft drink or beer a person is drinking, and they might not be aware of it, correct?
- If there was meth in a drink, you would not be able to see it, correct? It would be colorless and dissolve in that drink, isn't that correct?
- You may not taste it, either, isn't that right?
- And you may not be able to smell it when you put it up to drink it, isn't that right?
- In fact, you might not actually obtain any subjective results or feelings as a result of ingesting that meth?
- So I could spike your drink and you could have a positive urinalysis today or tomorrow?
- How long have you been actively involved with the laboratory analysis of urine?
- And would you say that this is pretty much a Department of Defense program would you agree with that?
- And this program is somewhat standardized amongst the DOD, in all branches of the service, correct?
- The Department of Defense has its guidelines and all the laboratories must follow the same DOD guidelines?
- All Naval Drug labs operate under a common SOP that is issued from BUMED, all are set up the same, the only difference is the civilian employees, correct?
- And if the DOD guidelines are not complied with, it would be improper, do you not agree, for a laboratory to report out a sample out as positive?
- The DOD Labs are Forensic Labs, are they not?
- And you would agree that the utilization of quality control system was not properly maintained and operated and a sample was reported out with the knowledge that the process was not properly operated and maintained, it would be improper to report it out, correct, under the DOD guidelines?
- Are the employees trained in the ethics of working their job?

- Now if a DOD Lab was determined to have been in non-compliance with forensic guidelines, they face the risk of decertification?
  - decertification is like a death sentence for a forensic lab, correct?
- If the NDSL, San Diego right now were to be decertified, that would have a very devastating effect upon the DOD, specially, the Navy Drug Urinalysis Program, wouldn't it?
- And would you agree that all DOD Labs are kept up to date with problems as they develop, if they're major problems, correct?
  
- Would you term a tampering situation, where it's been determined that employees have been able to tamper with the urinalysis lab process, as a major problem?
- So you would expect in a major problem of that magnitude that there would be ample communication sent out amongst DOD labs, let the other labs know what was going on and how to avoid it from happening again, correct?
- There was a rather significant problem in Norfolk a while back, is that correct? In Oct. 93 thru May 94 at the Norfolk lab, correct?
- There was some tampering going on during that time frame correct? Tampering by NDSL employees, right?
- Now the people/civilians that worked at the lab, they would have received ethical training, would they not?
- Similar to the training that the employees at your lab receive, correct?
- Isn't it a fact the expert witnesses from the Norfolk lab came into court-martials, just like this, testifying that the Norfolk lab was being run properly, just as you are today?
- How many Marines or Sailors were convicted at those court-martials where experts came in and testified as you are today, even though things were not done properly?
- You do agree that there were major irregularities at the Norfolk lab?
- So if you were aware of major irregularities such as tampering at Norfolk in your lab, I would assume that you would not walk on to a witness stand, take an oath, and testify that the samples were properly analyzed, would you?
- What are we going to learn tomorrow about the San Diego Navy Drug Lab?
- Would forensic irregularities in DOD labs, of the magnitude in Norfolk, lead to a decertification of that DOD lab?
- Was there any self-interest in the DOD, if you would know, with not decertifying the lab because of the consequences of doing so?
- Now would you have us believe that certification only depends upon the accuracy of the results, and we don't care what we do to get there? You're not suggesting that are you?
- Significant irregularities in the quality control assurance program are clearly very significant in forensic labs, agreed?



- And what was going on is that the radioactive counts were changed in the gamma counter computers, correct?
- And the printouts that were generated were discarded by the lab personnel, the original printouts, correct?
- And they were discarded for the purpose of covering up the fact that these people had been tampering with the data, correct?
- And then new printouts were generated to cover the tracks, correct?
- Results were actually changed during the course of tampering that was going on down in Norfolk, correct?
- Isn't it a fact that it was determined in 20 documented cases that the servicemembers urinalysis results were actually changed from positive to negative, for whatever reasons?
- Isn't it also a fact that service members results were changed at the RIA from negative to positive in two specific cases?
- The only way to know it was a false positive would be basically to have it tested by another lab, correct?
- In the quality control system, the program has caught samples that were known to be positive that were misreported out as negative, correct?
- So in actually, we just haven't caught one that was negative that was reported out as positive at this particular point - would that be fair statement?
- Have you ever taken time to figure up what the percentage of that quality control sampling is for the entire number of samples that re run through your labs?
- Is it fair statement that the AFIP program that existed during the Norfolk time frame is essentially the same exact AFIP program existing today?
- Why wasn't this caught back then? Why didn't AFIP catch this?
- Alright, samples that reported out positive tampered?
- The motivations for this tampering were operational in that past performance acceptance of criteria, and to reduce work load by decreasing the need to repeat access, correct?
- And to make a more favorable impression via high acceptance rates per batches?
- Now you would agree with me that this motivation reflects that morale and general working atmosphere has a lot to do with the end results that are generated by a lab?
- Would you agree with me that when people get overworked sometimes morale has a tendency to take a nosedive?
- Isn't it a fact that when people get overworked they may have more of a tendency to take some short cuts here and there?
- short cuts can be devastating in a forensic environment, wouldn't you agree?
- In fact, we learned this lesson from the Norfolk scenario where people started out taking short cuts and just kind of went on from there, right?

- We talked earlier about the fact that since Norfolk was a DOD lab that there would be communications after Norfolk had problems with the other labs, correct?
- And you would expect that all the DOD labs would have certainly been brought fully abreast of what was going on at Norfolk, would you agree with that?
- Despite that fact that there was a rather massive problem at Norfolk, we also know that in July 1995 there was a very significant problem at another DOD lab, the Fort Meade U.S. Army Drug Testing Lab.
- What came to light in July of 1995 involved 2 years worth of tampering, did it not?
- Do you know how many samples were run through the Fort Meade Lab on a monthly basis during that time frame?
- So you have no idea how many samples may have been subject to possible tampering at the DOD laboratory during that time frame, do you?
- In actuality what they were doing was that they were manipulating the quality controls, isn't that right?
- Somewhat similar situation as Norfolk is it not?
- Despite the fact that the Norfolk problem came to a head in May of 1994, more than 1 year later the same problem was found to have been going on at a another DOD lab?
- So all quality control programs in the world that were being utilized never found these problems, would you have agree?
- In fact, the Fort Meade problem was found by somebody physically seeing one of the employees moving the quality controls.
- You don't know -- Why in a scenario of such importance as tampering and moving quality controls in a DOD lab don't you know.
- Alright, why weren't you advised by the DOD?
- Isn't your lab interested in what type of problems are going on in another DOD lab?
- Wouldn't it be prudent practice for the DOD to make sure that all labs are made aware of the magnitude of the particular problem?
- Have you ever had an opportunity to review any reports concerning the Fort Meade lab?
- As a certifying official for the San Diego lab aren't you concerned with a pattern here, the Norfolk incident yet no decertification, the Fort Meade incident, yet no decertification.
- You don't think there is some type of cover up going on here do you to avoid the public from knowing of the problems going on at the DOD labs?
- You would agree if that scenario was fully addressed and the labs were decertified it could in fact have a very adverse impact upon the drug testing program.
- You testified that it is your guess that the ingestion of meth in this case happened within 24 to 48 hours prior to my client providing a sample, what is the basis of this guess?
- How many studies have been conducted on excretion rates for meth?

- And once again anybody in this room could have meth in their system right now and not even know it, correct?
- The DOD sets cut off levels for the screening, correct?
- What is the purpose of the cut off levels?
- It is also designed to avoid people who have been innocently exposed to a drug potentially coming up positive, correct?
- For example, the poppy seed dilemma. Poppy seeds are from the opium plant which has codeine and morphine, correct?
- The military became aware that an innocent person eating poppy seeds started to come up positive in a urinalysis test.
- The military has adjusted the cut off level to take that into account, correct?
- And the military did the same with marijuana to avoid the passive inhalation defense.
- Now the same potential problem exists for meth, isn't that correct?
- Since a drink can be spiked with meth, the military has done nothing to adjust its cut off levels to target higher levels, have they?
- So essentially you're saying there's really nothing that can be done to protect a marine who unknowingly drank a beer with meth in it, correct?
- If there was a dishonest employee at the San Diego lab, who for what ever reason wanted to tamper with a urine sample, in a hypothetical situation, if that employee in some manner tampered with the sample in question, contaminated it with meth, you would expect that for the sample in question, all aliquots pulled from it would be positive the entire time, right?
- To know for a fact that there has never been a false positive you would have to take every sample recorded out as positive, retest it, recalibrate the machines, and completely review the procedures, isn't that right?
- And you've told us that at your lab there's never been a false positive, correct?
- But you can not testify with 100% certainty that it has never happened.
- The Norfolk lab has been closed, correct?
- The Oakland lab was closed, correct?
- The San Diego Drug Lab has the highest number of meth pops in the world, correct?
- Now sir, the AU800 is the extraction machine, made in Japan, that tests 400 to 600 samples an hour for four different drugs, correct? And that's the machine you use.
- Ant the pippet machine? You have wo machines, running 18 hours a day, correct?
- And San Diego has 10 GC/MS that are all run by software programs?
- The extraction part of the test can take anywhere between 6 and 8 hours, correct?
- But it hasn't always been the GC/MS test, has it?
- Before, it was just the GC/FID test, but it was determined that this was inadequate and you went to the GC/MS test, correct?

- There were directors that relieved for dereliction of duty, correct?
- How many people work in the accessioning portion of your lab?
- And those people are responsible for accepting samples and pouring samples for further testing, correct?
- The San Diego lab receives 600,000 samples a year?
- About 50,000 samples a month, correct?
- The people in the accession department pour between 50,000 and 200,000 urine samples per month?
- And these people in the accessioning dep't are not drug experts are they?
- And they have rather poor jobs don't they?
- Fair to say that most people would agree that sitting at a desk all day pouring smelly urine from big jars to little jars is not a good job?
- There is a turnover of the people in these jobs, correct?
- From all you know these civilian workers use drugs themselves?
- And they've been known to spill urine in the accession department quite often, correct?
- How large are the tubes that are used?
- You mean to tell me that a person can make 1000s and 1000s of pours from a sample bottle into a small tube used for testing and not spill any of it?
- The question of how much urine they spill is important isn't it?
- If you spill urine you can contaminate other samples, right?
- Did you know Commander Pitts, the director of the Jacksonville Lab in 1983?
- He was relieved for cause and the lab shut down because of contamination in the lab?
- Were you aware that his testing equipment was broken and one test sample was contaminating the second sample?
- Can you tell me what a slop-over positive is?
- Isn't it true that slop-over positives occur at your lab?
- The equipment that you use at the lab is extremely sensitive, isn't it?
- So sensitive that a minor amount of urine carried from one experiment to another will cause a false reading?
- Just one drop is all that's needed for a false reading, correct?
- If the person working in the accession area spills a bottle of urine and doesn't wash his hands, he could contaminate hundreds of samples couldn't he?
- These workers are supposed to be supervised are they not?
- Are you sure that they are being watched closely?
- What about the night shifts?
- There is a log book maintained for access to the accession area, correct?
- Do you have that with you?
- How do we know who has been in the accession area? How do we know if someone

## **TAB F**

Note: No scanner was available when this deskbook was drafted, so you must insert your own sample evidence. To comport with the sample direct testimony, insert the following evidence in this order:

Prosecution Exhibit 1: Diagram of head and area where urinalysis occurred.

Prosecution Exhibit 2: Command Log Sheet (locally generated by the unit).

Prosecution Exhibit 3: Naval Drug Screening Laboratory (NDSL) document package - normally containing the following enclosures:

- Enclosure 1: Attesting certificate
- Enclosure 2: Custody document DD Form 2624 (2-sided document)
- Enclosure 3: Lab test documentation:
  - 1st screening printout
  - GC/MS confirmation printouts
  - 2nd screening (rescreen) printouts
  - Any additional materials needed

Prosecution Exhibit 4: Urinalysis sample bottle

Prosecution Exhibit 5: Diagram of NDSL

**SPECIAL COURT-MARTIAL  
NAVY-MARINE CORPS TRIAL JUDICIARY  
SIERRA JUDICIAL CIRCUIT**

UNITED STATES	)	
	)	STIPULATION OF FACT
V.	)	
	)	Special Court Martial
Carl A. Toker	)	
XXX XX XXXX	)	
Private First Class	)	
U.S. Marine Corps	)	
*****		

It is hereby agreed by and between trial and defense counsel, with expressed consent of the accused, that the following facts are true:

On [date], Private First Class Toker (PFC Toker), U.S. Marine Corps, provided a urine sample to the First Supply Battalion, First Force Service Support Group Urinalysis Coordinator.

On [date], PFC Toker provided the urine sample pursuant to a previously scheduled unit sweep urinalysis of Headquarters and Service Company, First Supply Battalion, First Force Service Support Group.

The urine sample provided by PFC Toker on [date] is identified by local batch number \_\_\_\_, specimen number \_\_, accession number \_\_\_\_, and is in fact the urine sample of PFC Toker, the accused.

PFC Toker provided his military identification card to the Urinalysis Coordinator, who verified the identity of PFC Toker using the military identification card, then filled out a white label using the information on the military identification card and provided an empty plastic bottle and lid to PFC Toker.

After being provided the empty bottle and lid PFC Toker walked to the head with an observer, while keeping the bottle in open view . While being observed in accordance with Marine Corps regulations PFC Toker urinated into an empty plastic bottle, Prosecution Exhibit \_\_, and after filling the bottle with his urine, PFC Toker placed the lid on the bottle and returned the filled bottle of urine to the Urinalysis Coordinator.

From the time when PFC Toker was given the bottle and lid to the time when PFC Toker returned the bottle to the Urinalysis Coordinator the bottle was never out of the possession of PFC Toker.

After the plastic bottle was returned to the Urinalysis Coordinator the white label previously filled out by the Urinalysis Coordinator was examined by PFC Toker for accurateness and was initialed by PFC Toker, who then placed the label on the bottle.

After the label was placed on the bottle PFC Toker sealed the bottle with a red sealing tape and placed his initials on the seal. The red tape extended over the lid and down over opposite sides of the bottle, each end of the red tape touching the white label.

The Urinalysis Coordinator properly maintained sole custody of both the empty and filled urine bottles during the entire urinalysis. At the completion of the urinalysis the Urinalysis Coordinator relinquished custody of the samples to the First Supply Battalion, First Force Service Support Group Substance Abuse Control Officer (SACO). The SACO properly secured and maintained the chain of custody of the urine sample of PFC Toker until he transferred custody of the samples to the Consolidate Substance Abuse Center (CSAC) at Camp Pendleton, California on [date].

CSAC personnel properly secured and maintained the chain of custody of the urine sample of PFC Toker, and the sample was properly transferred to the Navy Drug Screening Lab (NDSL) in San Diego, California.

When the urine sample of PFC Toker arrived at the NDSL the seal placed on the bottle by PFC Toker was intact and the bottle had not been tampered with.

The Urinalysis Coordinator, SACO, CSAC personnel, and NDSL personnel all followed the proper regulations in the handling, storing, and testing of the urine provide by PFC Toker.

On [2nd date], Private First Class Toker (PFC Toker), U.S. Marine Corps, provided a urine sample to the Brig Company, Security Battalion Substance Abuse Control Officer (SACO).

On [2nd date] PFC Toker provided the urine sample pursuant to his entry into pretrial confinement and per order of the Brig Commander and Security Battalion Commander, and in accordance with brig standard operating procedure that all incoming pretrial

using the information on the military identification card and provided an empty plastic bottle and lid to PFC Toker.

After being provided the empty bottle and lid PFC Toker walked to the head with an observer, while keeping the bottle in open view . While being observed in accordance with Marine Corps regulations PFC Toker urinated into an empty plastic bottle, Prosecution Exhibit \_\_\_, and after filling the bottle with his urine, PFC Toker placed the lid on the bottle and returned the filled bottle of urine to the SACO.

The observer actually observed PFC Toker receiving the empty plastic bottle and lid, escorted him to the urinal, viewed the urine leaving the body of PFC Toker and entering the bottle, PFC Toker placing the lid on the bottle, and PFC Toker returning the bottle to the SACO.

From the time when PFC Toker was given the bottle and lid to the time when PFC Toker returned the bottle to the SACO the bottle was never out of the possession of PFC Toker.

After the plastic bottle was returned to the SACO the white label previously filled out by the Urinalysis Coordinator was examined by PFC Toker for accurateness and was initialed by PFC Toker, who then placed the label on the bottle.

After the label was placed on the bottle PFC Toker sealed the bottle with a red sealing tape and placed his initials on the seal. The red tape extended over the lid and down over opposite sides of the bottle, each end of the red tape touching the white label.

The SACO properly maintained sole custody of both the empty and filled urine bottles during the entire urinalysis. At the completion of the urinalysis the SACO relinquished custody of the samples to the Consolidate Substance Abuse Center (CSAC) at Camp Pendleton, California on [2nd date].

CSAC personnel properly secured and maintained the chain of custody of the urine sample of PFC Toker, and the sample was properly transferred to the Navy Drug Screening Lab (NDSL) in San Diego, California.

When the urine sample of PFC Toker arrived at the NDSL the seal placed on the bottle by PFC Toker was intact and the bottle had not been tampered with.

The SACO, CSAC personnel, and NDSL personnel all followed the proper regulations



## DEFENSES

The defense may concentrate on one defense or use a combination of the following to create a general sense of reasonable doubt. A combination is most effective with good character evidence.

### 1. INNOCENT INGESTION / INHALATION

- Best chance of acquittal if nanogram level is low.
- **Notice** by the defense is required by RCM 701.
  - Exception: Accused may claim he's not sure where he innocently ingested, but that he's in the habit (MRE 406) of borrowing cigarettes/drinks from strangers. MJ probably won't require notice of this!
  - Witnesses: The defense *may* present an innocent ingestion via the accused's testimony only; other evidence or witnesses are not required. However, if they intend to call witnesses the defense must give notice they intend to call them. See Lewis 51 MJ 376 (1999).
  - Failure to Give Notice: If the DC fails to give notice don't expect the MJ will forbid him from using the defense. In the lack of a strong showing of bad faith, the most you can hope for is a continuance to interview witnesses. You have a tough choice whether to ask for the continuance or press on with trial. In most cases it's best to press on and cross-examine the best you can.
- Govt is not required to present evidence rebutting this defense (Pabon 42 MJ 404).
- Unknowing ingestion may produce effects felt by the person ingesting the drug.
- Low nanogram level may mean no effects were felt.
- Accused may not feel effects because of intoxication.
- Examples:
  - Food (ex: brownies) laced with marijuana.
  - Drink (usually beer or alcohol) spiked with raw cocaine.
  - Habitually borrowing cigarettes/drinks.
    - BUT: Cocaine won't pass through filter, and Marijuana has a very distinctive odor.
  - Oral / vaginal sex (cocaine/amph placed on genitals).
  - Metabolite passed through body fluid (ie. semen orally ingested).
  - Absorption through skin by contact with drugs or money.
    - Only freebase (rock) variety; powder cocaine usually not absorbable
    - Not currently a viable defense.
  - "Relaxation Tea" allegedly purchased from an untraceable source (a Native American Festival, for example).
- Best attack = common sense. For example, how much cocaine would have to be placed

## 2. PASSIVE INHALATION

- Cutoff levels effectively kill this defense.
- Preempt this defense during direct examination of lab expert.
- Distinctive smell of marijuana - accused would be aware of presence.

## 3. VOLUNTARY INTOXICATION

- Technically not a defense - used to raise doubt of knowing use (RCM 916l).
- Intoxication may prevent accused from feeling drug effects.
- Attack accused's knowledge of his intoxicated state (does he remember doing anything? How does he know where he was and what he did?).

## 4. CHAIN OF CUSTODY ATTACK

- Small breaks in procedures not fatal (Thomas 41 MJ 665, Instructions 112a n.8)
- Govt not required to show custody chain of bottle from manufacture to use.
- Chains of custody have improved drastically in recent years due to better education of SACO's and use of standard procedures. The two most common attacks are easily handled:

1. Observer did not actually observe the urine leave the flesh - In argument stress that this only allows the accused to tamper with his own specimen - which means he put tainted urine in his own sample!
2. Small break in chain after the red tape is placed over the bottle - establish that when received at the drug lab the sample was intact and the tape unbroken (see drug docs). If accused takes the stand make him state affirmatively he placed the tape on and secured it. If necessary, have the SACO "experiment" with red tapes (prior to trial) and establish that the tape cannot be removed without tearing the white label. Don't do an in-court demonstration; have them testify about their experiment instead.

The most effective chain of custody attack highlights small, numerous mistakes made in collection and transportation. Although there is not one point where the defense can show where tampering occurred, the members' confidence in the overall collection process is undermined. The risk is that they will "send a message" to the command to clean up it's procedures by acquitting the accused.

## 5. LAB MISTAKE (note: see the sample defense cross in TAB E).

- Examples:
  - Cross-reactivity of over the counter preparations with testing compounds to produce a false positive (Bodybuilding compounds, antihistamine, ephedrine).

- a. Testing technology - DC may point out there are more accurate, or more specific tests available that the DOD doesn't use. Ex: DNA, hair analysis, or tests to distinguish whether cocaine entered the urine via ingestion, or by being placed in the sample after urination. **ASK YOUR EXPERT ABOUT SUCH TESTS PRIOR TO TRIAL.** The defense goal is to show that the technology changes; how much faith can we have in tests now when "accurate" past tests may be responsible for wrongful convictions?
- b. Testing Procedures / Personnel - Discovery requests for QC reports, calibration records, or technician personnel records are a tip-off the defense is heading this way. Consider a retest of the sample prior to trial (bear in mind the retest results are discoverable, however). If you don't retest, consider whether the defense opens the door for you to ask the expert who can request a retest (either party). Be careful not to burden-shift.

## 6. GOOD CHARACTER

- Very common defense; accused's with poor records are usually counseled to take NJP or plead guilty.
- Examples: Good military character  
Law-abidingness  
Sobriety  
Religious beliefs against drug use (Brown 41 MJ 1).
- Best attack is "Did you know" impeachment questions about past bad acts (MRE 608b) or bad character opinions, if available.
- Screen accused's SRB carefully for prior misconduct or preservice criminal activity.
- Interview family members, friends, prior employers.
- Consider NCIC check for past convictions (call NCIS).
- Be wary of defense attempts to sneak in specific good acts evidence (MRE 405, 608) (Shelkle 47 MJ 110).
- Examples: "He's never [used drugs] [been in trouble] [been arrested] [come up positive] [been seen using drugs] before."
  - However: don't object if opens door to bad acts evidence (prior arrests, preservice drug use, etc).
- Remind members in argument that drug users range from street addicts to CEO's and national politicians - perceived good character proves nothing.
- Look out for MRE 405 affidavits to prove character - sometimes it's a good idea to have a "bad character" affidavit ready.
- Truthfulness is not a character trait at issue until the accused testifies.

the accused's body actually processed the cocaine. This is incorrect. EME has been found as a contaminant in street cocaine. It can also be detected in urine if someone places raw cocaine in a specimen. Additionally, the absence of EME does not show the individual did not take cocaine. EME disappears from the specimen before BE disappears.

I'm guessing that you find this mumbo jumbo as confusing as I do. So, don't ask me to explain it, ask an expert. The bottom line is that the best rebuttal to the alleged unknowing user is a solid collection and testing process with an intact chain of custody and some common sense.

#### 8. LEGAL USE

- Prescription THC = Marinol or Dronabinol - used by cancer & AIDS patients.
- **Hemp seed oil** products: may contain residual THC.
  - Oil is derived from stalks of same plant as marijuana ("cannabis sativa").
  - THC is removed from the stalks by chemical wash/solvents.
  - THC in the hemp is from contamination by leaf and resin debris.
  - The problem is that 21 USC 802 excludes oil derived from seeds from the definition of "marijuana", and the FDA doesn't regulate the manufacture of hemp seed oil. The result is contamination of the oil with THC residue.
  - Hemp oil does not cause "high."
  - Products are currently legal. No existing DOD policy on these .

##### Examples:

- Health from the Sun Natural Gold (bodybuilding supplement)
- Hemp 1000 Capsules (nutritional supplement)
- Kentucky Hemp Beer, Hempen Ale
- Hemp cooking oil
- Use of products can theoretically result in THC metabolite above cutoff level.
  - However, AFIP studies human use studies of 146 samples failed to confirm the presence of THC in the urine of those ingesting the products. POC for these studies is LCDR Kenneth Cole, USN at DSN 285-0048.
- NDSL can't distinguish between "stalk" or "leaf" THC.
- Best attack: treat as innocent ingestion defense:
  - Contact HQMC (JAM) @ DSN 224-3699/4250.
  - Send any hemp-based products seized to the Armed Forces Institute of Pathology (DSN 285-0100, Comm (301) 319 0100) to test THC levels. Establish a chain of custody prior to sending.
  - If a bodybuilding product, interview his workout partners, check the gym logs, etc. Contact the shop where the oil was obtained and interview the

- **Poppy seeds** (heroin/morphine/codeine) - In 1998, DOD raised the cutoff levels of codeine to 2000 ng/ml and morphine to 4000 ng/ml to reduce (eliminate?) poppy seed positives.

- Cocaine used in limited surgical procedures (ex: nasal surgery) in small doses.

- Barbiturates and narcotics available via prescription (sleeping pills, pain killers).

- Amphetamine used on hyperactive children, appetite suppression, narcolepsy.

- LSD and heroin have no legitimate medical purpose.

- GENERAL ATTACKS ON EXPERT'S CREATED BY HEMP (all drugs):

- Hemp gave the defense damaging questions to ask experts in **all** drug cases.

Ex: "In the past you've testified that the only way for THC to enter the body was marijuana? Since then you've discovered there is a legal way to get THC in the system?

So it's conceivable there could be legal ways to get \_\_\_\_\_ in one's system you're not yet aware of?"

## CROSS EXAMINATION AND REBUTTAL

CROSS EXAM OF THE ACCUSED - Although many defenses can be presented without putting the accused on the stand, defense counsel, especially experienced ones, may elect to chance it. This is an enormous opportunity and you must be ready to cross-exam the accused. Prepare cross as much as possible prior to trial - you'll know generally about what the accused will testify, so have your questions and evidence ready. Write your questions ahead of time, using headlines to find your place quickly, and use "concession-based" cross (questions he has to agree with) to corroborate your case as much as possible. Example:

### Chain of custody

- You urinated in that bottle, correct? (YES)
- And you closed the top? (YES)
- Then you placed the white label and red tape on that bottle? (YES)
- And placed that bottle of your urine in the box? (YES)
- So the bottle that was sealed and placed in the box contained your urine and nothing else? (YES)

### Party

- You went to a party on 31 December? (YES)
- And at that party you heard people were smoking marijuana? (YES)
- You smelled that distinctive smell of marijuana at that party, didn't you? (YES)
- Even though you heard people were smoking marijuana, and you smelled that distinctive smell, you remained at that party for several hours, correct? (UH...)

The golden rule is "Get the accused talking." Get him saying "yes" for a while - it may open doors; most accuseds aren't bright. Occasionally an accused may take the stand and do nothing more than deny he used drugs. Although the judge may severely limit you, it is possible to open the accused up and begin a thorough cross (Ex: "then you know marijuana use by Marines is wrong?" "And you don't know how that urinalysis came up positive." "That was your urinalysis that came up positive?" "That was your urine in that bottle that tested positive?" etc.

Also, notice how the cross exam above "echoes" the points you're trying to stress in succeeding questions ("distinctive smell", "your urine"). Such a technique is a permissible way to repeatedly get your point across to the members without drawing a cumulative, or "asked and answered" objection.

Show that the accused remained in the vicinity despite his knowledge of the presence of drugs. In argument stress that no good Marine or Sailor remains in the presence of illegal drugs.

Consider establishing the motive to misrepresent in the testimony of the accused. MRE 608c. He may have many years in, be awaiting promotion or reenlistment, or just have a clean record. The danger is that such cross may cause members to wonder if they should put hardship on this otherwise good Marine. An alternate method is to address his motive to lie during argument.

Finally, remember that if the members find guilt after an accused testifies, you will get the **mendacity instruction** from the judge. This is a devastating instruction; discuss it in argument and tell the members that when the accused lied to them he demonstrated his lack of rehabilitative potential. Go for the BCD!

IMPEACHMENT OF DEFENSE WITNESSES – Here's 4 classic ways to impeach defense witnesses:

- Bad character for truthfulness (opinion or specific acts)
- Prior inconsistent statement
- Bias, prejudice, motive to represent
- Contradiction

If witnesses give differing accounts, or (the rare case) you actually catch the witness lying, make sure you pause and look at the panel, as if to say "Did you get that, members?" And of course, don't forget to address the lies in argument.

Impeachment requires work, and background checks if necessary. Consider asking NCIS to do a criminal background check on civilian defense witnesses. Such checks may yield useful results. When you interview character witnesses find out what they know about the charged offense, and the conduct of the accused pursuant to the offense. Often a character witness has no idea what the accused did. I recommend informing them ahead of time of the circumstances of the offense and any specific bad acts evidence of the accused (prior NJP, preservice drug use, etc). Some trial counsel like to save this information and spring it on the witness at trial, but too often this tactic backfires or falls flat, since you don't know what the witness will answer. Normally it doesn't matter what the witness answers anyway, since the real value is in just asking the question (Ex: "Did you know the accused had a prior NJP for disrespect and false official statement?"

the defense counsel will be aware of the rebuttal evidence anyway and will keep the door closed.

Also, let the defense know of your rebuttal case up front. It saves time, and can sometimes make the accused plead guilty. If you are considering saving evidence for rebuttal, be cognizant of the disclosure requirements. Exculpatory evidence tending to cast reasonable doubt on the accused's guilt (RCM 701a6A), statements by the accused constituting an admission or confession (MRE 304d1), and evidence seized from the accused (MRE 311) must be disclosed prior to trial. Evidence rebutting an alibi must be disclosed.

Uncharged misconduct, however, does not always have to be disclosed (unless you plan to use it in your case in chief, of course). For example, if there is evidence of uncharged drug use in the same general time frame as the offense and you are certain the accused will take the stand and deny the offense you have the advantage of surprise by saving this evidence for rebuttal. Disclosure is not required in such a case. Be careful, however, as "sandbagging" your opponent is discouraged by the judiciary. Nondisclosure should be the rare exception.

If you have rebuttal evidence to admit, request an Article 39a session after the defense rests, announce you have rebuttal and present the judge a summary of your rebuttal case and offer of proof. The defense can object at that time and the issue can be resolved out of member's hearing. This saves the court time and saves you possible embarrassment (and loss of credibility in front of members) if the judge rules that your evidence is not admissible.

Move quickly through rebuttal. Normally you have only one or two points to make anyway. Brevity keeps the impact strong.



## CROSS - GOOD MIL CHARACTER WITNESSES

### YOU DON'T KNOW WHAT HE DOES ON HIS LIBERTY TIME

- Your opinion of \_\_\_\_\_ character was based on work performance you observed, correct?
- You haven't spent time observing \_\_\_\_\_ on liberty, have you?
- So it would be more correct to say your opinion is solely about his military character while he's at work?
- You only know about his work character, not his liberty character, right?

### GOOD WORKERS

- During your career you've observed the performance of many Marines, haven't you?
- Some of those Marines did things that surprised you, didn't they?
- Some of those Marines did things that seemed out of character, didn't they?
- Some of those Marines got into trouble, didn't they?
- And, fair to say, that some of those Marines surprised you when they got in trouble?
- So being good at work doesn't guarantee a Marine is good on liberty?
- Some of our best performers have trouble on liberty, don't they?

### HIGHER RANK (NCO'S +)

- You've seen Marines of all ranks get in trouble, haven't you?
- Misconduct isn't restricted exclusively to a certain rank, is it?

### WAS UNAWARE OF IT

- Is it your experience that when a Marine does something illegal he voluntarily shares that with his military superiors?
- Fair to say that when most Marines, or even most people, do something illegal, they keep it a secret?

### FALLIBILITY OF HIS OPINION

- Your opinion of a person's character isn't infallible, is it?
- You're capable of misjudging a person's character, aren't you?
- You wouldn't consider yourself to be a human lie detector, would you?

**UNITED STATES MARINE CORPS**  
Marine Aircraft Group 42  
Marine Aircraft Support Detachment  
Fourth Marine Aircraft Wing, FMF, USMC  
Naval Air Station New Orleans  
Belle-Chasse, Louisiana 70143-0100

5800  
[date]

From: Lieutenant Colonel A. B. Jones  
To: Court-Martial Members

Subj: STATEMENT OF CHARACTER; CASE OF SERGEANT IMA BAGG  
123 45 6789 USMC

1. I am the Commanding Officer, Marine Aircraft Support Detachment, Marine Aircraft Group 42. In my capacity I both observe the work performance of Marines in Marine Aircraft Group 42 and receive feedback concerning those Marines from their supervisors. By doing so I become familiar with the reputation of each Marine in the unit.

2. I know Sergeant Bagg, and I am aware of her reputation. I have known Sergeant Bagg since she reported aboard in November of 1996. Sergeant Bagg was assigned to work in the Marine Aircraft Support Detachment of Marine Aircraft Group 42. I did not know Sergeant Bagg before she reported aboard. I received information concerning Sergeant Bagg's work performance, military character and military conduct from his work supervisors and others in his chain of command, including her NCOIC, SNCOIC, and other Marines in my unit.

3. I have not personally observed Sergeant Bagg's military character and veracity, however numerous people have come into contact with her, and observed her conduct and traits as a Marine. I have spoken to people about these, and learned of the reputation Sergeant Bagg developed. In my opinion Sergeant Bagg's reputation in this military community is that while she is a good worker, she is a Marine with average, and at times, below average military character. Further, Sergeant Bagg has a reputation in this military community for being an untruthful person.

ATTESTING CERTIFICATE - SERVICE RECORD BOOK

\_\_\_\_\_ " I certify that I am the Personnel Chief in charge of official records pertaining to Marines assigned to 3d Low Altitude Air Defense battalion (3d LAAD), Camp Pendleton, CA. Specifically, my clerks and I maintain the Service Record Books of Marines assigned to 3d LAAD. The following documents relating to the Service Record Book of \_\_\_\_\_ I certify as being true and accurate copies from his original Service Record Book:

- (1) Enlistment/Reenlistment Documents DD Forms 4/1, 4/2, 4/3
- (2) Chronological Record NAVMC 118(3)
- (3) Record of Service dated 960712
- (4) Weapons Firing Record NAVMC 118(6)
- (5) Education and Training Record NAVMC 118(8a)
- (6) Awards Record NAVMC 118(9)
- (7) Administrative Remarks NAVMC 118(11) and 11(a)
- (8) Offenses and Punishments NAVMC 118(12) and 12(a)
- (9) Record of Emergency Data
- (10) SGLI Election Form"

\_\_\_\_\_  
I. M. PAPERPUSHER  
Staff Sergeant, U.S. Marine Corps  
Personnel Chief

References: MRE 803(8) and 901(7)

## POINTS OF CONTACT

Naval Drug Screening Laboratory, San Diego  
34425 Farenholt Avenue Building 26-2B  
San Diego, California 92134-5298

Comm: (619) 532-9372  
DSN: 522-9372  
Fax: 522-5187

Directions to NDSL San Diego from Camp Pendleton: I-5 South to Pershing Drive exit (you're going to Balboa Naval Hospital). Take Pershing Drive until you reach a stoplight at Florida Canyon Road. Left on Florida Canyon Road, then left on Bob Wilson Drive (about 1/2 mile). Pass sentry shack and go to 2nd stop sign. Turn right. The NDSL is on the left (look for the sign). You may use visitor parking, or Government vehicle parking if in Governmentt vehicle. There is also off-site parking with a shuttle every 10 minutes.

Naval Drug Screening Laboratory Great Lakes  
320B "B" Street  
Great Lakes, Illinois 60088-2815

Comm: (847) 688-2045  
DSN: 792-2045  
Fax: 792-5513

Naval Drug Screening Laboratory, Jacksonville  
P.O. Box 113  
Jacksonville, Florida 32212-0113

Comm: (904) 542-7755  
DSN: 942-7755  
Fax: 942-7761

Armed Forces Institute of Pathology (AFIP)  
Quality Assurance Division  
(301) 319-0100

Medical Review Office (for opiate cases)

UCLA Olympic Analytical Laboratory  
(Attn: Receiving)  
2122 Granville Avenue  
Los Angeles, CA 90025-6106

(310) 825-2635  
(310) 206-9077 (fax)

To request a litigation package for a steroid case, prepare a letter on letterhead with the following information:

- All specimen identification numbers (yours and UCLA's)
- Name, mailing address, telephone number and fax number of the person who will receive the package.
- Name and telephone number of the contact person for the case (trial counsel).
- If known, the date by which the package is needed. It needed in less than 2 weeks, call first.
- The purchase order number. Normal charge is **\$300.00** per specimen.
- Expert fee is **\$500.00**.

## REFERENCES

- 21 USC 812 and 21 CFR 1308.11 - 1308.15 - Schedules of Controlled Substances
- DOD Directive 1010.1 – Military Personnel Drug Abuse Testing Program
- DOD Instruction 1010.16 – Technical Procedures for the Military Personnel Drug Abuse Testing Program
- SECNAVINST 5300.28C - Military Substance Abuse Prevention and Control  
(Note: see Daskam 31 MJ 77 for a discussion of how Navy directives don't allow use of command-directed urinalyses except as impeachment or in rebuttal).
- OPNAVINST 5350.4 (enclosure 4 - use of urinalysis results)
- MCO P5300.12A - The Marine Corps Substance Abuse Program
- Urinalysis Coordinator's Handbook (DON)
- Urinalysis Coordinator's Handbook (USMC)
- NDSL San Diego info sheet

## **OVERVIEW OF FORENSIC URINE DRUG TESTING (FUDT) PROCEDURES**

The drug testing laboratory analyzes urine samples for evidence of drug use. Boxes containing urine specimens arrive at the laboratory by several methods, including US Mail, Air Carrier (e.g. FedEx) and courier. All specimens are received by personnel assigned to the Accessioning Area. The drug testing laboratory is a controlled area, with access to the laboratory itself limited by a key card entry system. The Accessioning Area is a secure storage area within the laboratory itself. The entrance to this room is secured by a key card entry system that is tied to a database recording entries and exits. This room is accessible only to Accessioning personnel, persons on the access list, and individuals who are escorted.

The boxes containing the urine specimens are inspected for evidence of tampering. After inspecting seals, the boxes are opened and the specimen bottles are checked. During inspection, the bottles are inventoried against the enclosed chain-of-custody document, checked to insure the tamper resistant tape is intact and properly applied, checked to determine that information on the bottle label is the same as on the chain-of-custody document and checked to insure that information on the bottle label is complete and in accordance with service regulations. If any discrepancies are discovered, the discrepancies must be documented and appropriate corrective action taken before the specimens can be processed.

Each specimen bottle is assigned a unique Laboratory Accession Number (LAN). The LAN for each specimen is placed on the chain-of-custody document, and multiple replicates of the LAN labels imprinted with the LAN are affixed to each bottle. Each specimen is retained in the Accessioning Area until it is approved for destruction. Only portions of urine (aliquots) are taken outside this room for testing. Aliquots are poured from the original bottle on separate occasions, so that separate tests can be performed. Nothing is ever added to or dipped into the original bottle and aliquots are destroyed after completing each test. Every time a test is done, a new aliquot of urine is used. Each aliquot is labeled with a human readable bar-coded LAN label.

A regulated forensic drug testing laboratory is required to employ an immunoassay (IA) test to quickly distinguish between two types of specimens: those which are negative and those which are presumptive positive. The negative specimens are reported negative while the presumptive positives will go on to further testing. In the DoD labs, the next level of testing is a repeat IA under more stringent administrative conditions. If this test upholds the presumptive positive result obtained on the first test, then the lab is required to

The IA test employs a specific drug antibody for each drug tested and a specially labeled drug molecule called the antigen or tracer. If a specimen is negative, all of the drug antibody binding sites will be occupied by the antigen. On the other hand, if a specimen contains the drug being tested, there will be molecular competition for the limited number of antibody sites between the drug and the antigen resulting in a smaller amount of the antigen being bound. The greater the concentration of the drug, the less antigen will be bound. In effect, the drug being tested - if present - acts as an inhibitor to the binding of the antigen. This difference in antigen binding produces a measurable difference between positive negative specimens by producing a physical difference in the test medium. To determine if the test is positive, the response for each specimen, for each drug analyzed, is compared to the response obtained from a solution containing each drug at the cutoff level. If the test response indicates a concentration higher than the cutoff, the test result is considered presumptive positive.

Each presumptive positive sample undergoes a confirmation test using GC/MS, a completely different analytical method. GC/MS, a highly specific and an extremely reliable method of drug analysis, is considered the "gold standard" for confirming the presence of drug. Presumptive positive samples undergo chemical extraction and derivatization, if required, to prepare the GC/MS testing. The GC/MS instrument is a combination of a gas chromatograph (GC) and a mass spectrometer (MS). The purpose of the GC is to separate the various compounds in a sample so that a specific compound can be analyzed independently by the MS. The sample is injected into the GC/MS, vaporized and carried through a long narrow coated tube by an inert gas. Chemical compounds travel through the column at different speeds, and thus exit at different times, known as the compound's retention times. As the chemical compound being analyzed emerges from the column, it is bombarded into ions in a predictable, characteristic, and highly reproducible ion fragmentation pattern. The ion fragmentation pattern is specific and unique to each compound, much like a fingerprint. The analytical response of each specimen tested is compared to a calibrator, which contains particular drug at the cutoff level. If the fingerprint matches that of the calibrator and the drug concentration exceeds the cutoff, the specimen is considered to be positive. Only after this confirmatory test, may a result be reported positive. In the case of methamphetamine, an additional GC/MS test is performed to establish the chirality (handedness) of the methamphetamine detected. Since an over-the-counter product (Vicks Inhaler) contains left handed methamphetamine (1-deoxyephedrine), the precaution of this additional test is necessary to ensure that this product can be distinguished from the illegal methamphetamine which is



administrative performance of the laboratory is continually and rigorously monitored by the Armed Forces Institute of Pathology (AFIP)

Quality Control Program. AFIP sends both positive and negative, "open" and "blind" control samples to the laboratory. The AFIP program not only stresses analytical aspects, but also detects clerical or administrative errors in the system. There is no margin of error allowed for a false positive (i.e. a specimen reported positive although it did not, in fact, contain a drug).

Chain-of-custody procedures are strictly followed at the laboratory. The internal chain-of-custody forms are annotated each time aliquots are transferred from the custody of one person to another until completion of all testing procedures and destruction of the aliquots. When a technician receives the aliquots, he or she is responsible for maintaining physical control over them, until they are transferred to someone else or testing is completed and the aliquots are destroyed.

Use of marijuana is established through the detection of tetrahydrocannabinol (THC) metabolites in urine. THC is the principal psychoactive ingredient in marijuana and it has not been reported to occur in nature in any plant other than the marijuana plant. Metabolites are breakdown products of the drug produced by metabolism, a process of chemical transformation of substances taken into the body. The predominant THC metabolite found in human urine is 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid (9-carboxy-THC). DoD requires that a sample have a concentration of the THC metabolites equal to or greater than 50 ng/mL of cross reacting cannabinoids (CRC) by immunoassay (IA) to be considered "presumptive positive." The DoD cutoff level for 9-carboxy-THC by gas chromatography mass spectrometry (GC/MS) confirmation test is 15 ng/mL.

Urine testing for cocaine is similar to that for THC, but the cutoff level of the cocaine IA test is 150 ng/mL. The cocaine metabolite tested by GC/MS uses benzoylecgonine. For a sample to be reported as positive for cocaine, the concentration of benzoylecgonine in the sample must be at least 100 ng/mL by GC/MS.

Testing methodology for opiates is analogous. The IA cutoff for opiates is 2000 ng/mL. The DoD defined cutoff level GC/MS confirmation test 4000 ng/mL for morphine and 2000 ng/mL for codeine. All specimens positive for morphine are also tested by GC/MS for 6-monoacetylmorphine (6-MAM), a metabolite of heroin. The 6-MAM cutoff level by the GC/MS confirmation test is 10 ng/mL.

The IA cutoff level for amphetamine is 500 ng/mL. The amphetamine

If a specimen has a concentration of the target compound lower than the cutoff level on any of the tests performed on the specimen, it is reported as negative. All specimens confirmed positive at the laboratory are maintained in secure frozen storage in the Accessioning Area for at least one year.

#### UCLA STEROIDS TESTING LAB PROCEDURES

The UCLA Steroids Testing Laboratory has specimen control functions, chain of custody standards and quality control procedures similar to those found in the NDSL's. Steroids, unlike the single GC/MS confirmation for drugs tested at the NDSL, are subjected to the GC/MS twice. Another difference is the need to identify the gender of the member providing the urine for testing on the DD Form 2624's and the specimen bottles, since steroid levels are expected to vary between the sexes. The specimen is tested for two types of steroids: natural (endogenous) and synthetic (exogenous). The detection of a synthetic steroid means the member ingested it into his body. The detection of naturally created steroids is a more difficult matter. The human body naturally produces testosterone, for example. UCLA tests for the testosterone to epitestosterone (a metabolite of testosterone) ratio (T/C ratio) which allows a scientist to determine if the testosterone was naturally produced or ingested into the body. Should your base be notified there is a member specimen with a TE ratio of greater than 6 to 1, your law enforcement agencies must become involved so that two additional urine specimens can be collected from the member and sent to UCLA for additional analysis. The additional specimens can be collected by consent, command directed or under probable cause. They should be collected on two separate occasions, at least three weeks apart.

# **TAB M: DRUG TESTING CASE LAW UPDATE**

You can obtain a copy of this publication by calling the Legal Advisor,  
USAF Drug Testing Program, Brooks AFB, TX, DSN 240-2247/2257, or  
commercial (210) 536-2257. The Legal Advisor can mail or email a copy  
to you.

The Legal Advisor plans to publish the updates on a public website in  
the future. As of the date below that the update is not yet available  
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19 April 2000